MYERS et al. *v.* COMMONWEALTH.

March 16, 1922.

[111 S. E. 463.]

1. Criminal Law (§ 1091 (14)*)—Exceptions in General Bill Containing All Evidence Do Not Require Review of Rulings Where No Bill of Exceptions Points Them Out.—An assignment that the court erred in refusing to sustain objections to the admissibility of evidence as shown by the exceptions in the record will not be considered where there was no bill of exception pointing out the rulings and the assignment complained of; the only exceptions to the evidence being contained in the general bill certifying all of the evidence, and nothing at intervals that objections were made to the admissibility of evidence which were overruled, and exceptions taken.

[Ed. Note.—For other cases, see 5 Va.-W. Va. Enc. Dig. 362.]

2. Indictment and Information (§ 125 (3)*)—Indictment in One Count Charging Breaking and Larceny Is One for Breaking.—Where an indictment in one count charged defendant with breaking and entering a railroad car, and therein stealing and taking away certain goods, it must be regarded as an indictment for car breaking.

[Ed. Note.—For other cases, see 5 Va.-W. Va. Enc. Dig. 440.]

3. Burglary (§ 23*)—Description of Property Stolen from Railroad Car Held Sufficient.—In an indictment for breaking and entering a railroad car, a description of the property taken by number of articles of various kinds, with the value of each, "then being in the lawful custody and possession" of the railroad company, would be a sufficient description even to charge the larceny of the goods, and when, in addition, the name of the consignee to whom the goods were billed was given, the property was identified beyond all reasonable doubt.

[Ed. Note.—For other cases, see 5 Va.-W. Va. Enc. Dig. 406.]

4. Criminal Law (§ 1172 (1)*)—Instruction Authorizing Conviction of Both Defendants if Either Broke into Car Held Not Prejudicial.—In a prosecution of two defendants for breaking and entering a railroad car, an instruction that if either broke and entered the car the jury could convict them could not have prejudicially misled the jury where the evidence showed that both the accused acted in concert, so that the jury must have understood both could be convicted for the act of one only if the other was aiding and abetting.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 726.]

5. Burglary (§ 42 (1)*)—Requested Instruction Possession of Stolen Property Was Not Evidence of Breaking and Entry Is Erroneous.—A requested instruction that possession of goods stolen from the car which was broken and entered could in no event be construed as evidence of breaking and entering of said car was manifestly erroneous.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 708.]

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

6. Burglary (§ 45*)—Criminal Law (§ 759 (4)*)—Conclusion to Be Drawn from Possession of Stolen Property Is for the Jury, and Instructions Must Not Infringe on Jury's Province.—The conclusion to be drawn from the circumstances of the possession of the stolen goods is one of fact which is in the province of the jury, and an instruction given thereon must not infringe upon the prerogative of the jury as the sole judges of the weight to be given to the testimony.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 730.]

7. Burglary (§ 42 (1)*)—Corpus Delicti Must Be Proved before Guilt Can Be Inferred from Possession of Fruits.—The corpus delicti of car breaking must be proved before an inference of guilt can be drawn from the possession by defendants of the fruits of the crime.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 77.]

8. Burglary (§§ 38, 45*)—Court Can Exclude Evidence of Possession So Remote as to Have No Probative Value.—The rule that the weight to be given to possession of stolen property in a prosecution for burglary is a question solely for the jury is subject to the qualification that, if the possession is very remote, the judge, at his discretion, may exclude it from evidence as having no sufficient tendency to prove anything.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 661.]

9. Burglary (§ 42 (3)*)—Circumstances in Connection with Defendant's Possession of Fruits of Crime Held Evidence of Breaking.—In a prosecution for breaking and entering a railroad car, evidence that defendant denied the possession of some of the property, and gave false explanations of possession of the rest of it, and, though they testified, did not claim to have acquired the property innocently, held sufficient inculpatory circumstances to sustain a conviction for breaking and entering in connection with proof of the possession of the fruits of the crime.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 662.]

10. Criminal Law (§ 881 (4)*)—General Verdict under Indictment Containing One Count for Breaking and Larceny Thereafter Is for Breaking and Entering.—Where the indictment charged in a single count the breaking and entering of a railroad car, and the larceny therefrom of certain property, a general verdict of guilty as charged in the indictment was a conviction of breaking and entering.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 442.]

11. Burglary (§§ 38, 42 (3)*)—Possession of Stolen Goods May Be Considered with Other Inculpatory Circumstances to Establish Breaking.—Where goods were obtained by means of breaking and entering a railroad car, the possession of the goods shortly thereafter is a material circumstance to be considered by the jury in determining the guilt of the accused of the breaking and entering, and, with other

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evidence of inculpatory circumstances or guilty conduct, will warrant a conviction.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 661.]

12. Burglary (§ 42 (3)*)—False Swearing as to Possession, False Explanation, or Absence of Claim of Innocent Possession Sufficient with Possession to Establish Breaking.—The possession of goods stolen by the breaking and entering of a railroad car, in connection with either false testimony denying the possession, a false account of the possession, or the circumstance that the accused, although taking the stand in their own behalf, did not claim to have acquired possession by means other than the breaking, is sufficient to sustain a conviction for the breaking.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 661.]

13. Burglary (§ 42 (3)*)—Facts Corroborating Possession Need Not Connect Accused with Breaking.—Inculpatory facts sufficient, with possession of property stolen by the breaking and entering of a railroad car, to convict accused of the breaking, need not tend to connect accused with the actual breaking.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 661.]

14. Criminal Law (§ 1028*)—Defense Not Made by Accused in Testimony Need Not Be Considered.—Where the accused took the stand in their own behalf, and failed by their testimony to make a defense which might have been made, the court cannot consider the possibility of such defense as sufficient to defeat the conviction.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 82.]

15. Burglary (§ 23*)—Ownership of Stolen Goods May Be Alleged in General or Special Owner.—Where the goods at the time of their taking by breaking and entering were in the possession of a special owner, such as a bailee or carrier, the indictment may allege the ownership of the goods in either the general or special owner.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 224.]

16. Burglary (§ 28 (7)*)—Indictment Held to Allege Special Ownership, So that Proof of General Owner Was Unnecessary.—An indictment for breaking and entering a railroad car, and stealing therefrom certain goods consigned to a named individual, then and there in the possession of the railroad company, changed the ownership to be in the railroad company, the special owner, so that it was unnecessary for the prosecution to prove that the general owner was deprived of his property by the taking.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 224.]

17. Criminal Law (§§ 763, 764 (3, 4)*)—Instruction there Was No Evidence to Support Particular Issue Should Not Be Given.—An instruction that there was no evidence to support the charge of car breaking should not be given in a criminal case, even though there is no

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

statute expressly forbidding such instruction in a criminal case similar to Code 1919, § 6003, applying to civil cases.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 734.]

Error to Corporation Court of Roanoke.

William Myers and another were convicted of breaking and entering a railroad car, and they bring error. Affirmed.

A. B. Hunt and *Lawson Worrell,* both of Roanoke, for plaintiffs in error.

John R. Saunders, Atty. Gen., J. D. Hank, Jr., Asst. Atty. Gen., and *Leon M. Bazile, Second Asst. Atty. Gen.,* for the Commonwealth.

DRAPER *v.* COMMONWEALTH.

March 16, 1922.

[111 S. E. 471.]

1. Grand Jury (§ 34*)—Appearance of Prosecuting Attorney during Deliberations Does Not Require Abatement of Indictment unless Prejudicial.—Though it was a violation of Code 1919, § 4864, for the prosecuting attorney to appear before the grand jury during their deliberations when not sworn as a witness, his appearance before them does not require an abatement of the indictment unless it prejudiced defendant.

[Ed. Note.—For other cases, see 6 Va.-W. Va. Enc. Dig. 756.]

2. Statutes (§ 225¾*)—Incorporation of Prior Code Section in Later Code without Change Adopts Prior Construction.—Where the revisors and Legislature incorporated a section of the Code of 1904, without change, in the Code of 1919 as section 4864, they impliedly adopted the construction placed on the former Code section.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 770.]

3. Grand Jury (§ 34*)—Advice to Grand Jury Held Not to Have Prejudiced Accused.—Where the prosecuting attorney, when he appeared before the grand jury at their request without being sworn as a witness, merely advised them that they could strike from an indictment against numerous defendants as presented to them the names of two of those defendants, the attorney's appearance was not prejudicial to another defendant charged by the same indictment, and does not entitle that defendant to an abatement of the indictment.

[Ed. Note.—For other cases, see 6 Va.-W. Va. Enc. Dig. 756.]

4. Criminal Law (§§ 317, 351 (10), 721½ (2)*)—Commonwealth Could Inquire whether Defendant Kept a Material Witness Away, and Inference and Argument Thereon Proper.—In a prosecution for participation in a mob which attempted to lynch a prisoner, where a

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